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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, ET AL.,

Appellants,

v.

JAMES "SLOPPY" FLOYD, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF FOR THE APPELLANTS

HOWARD MOORE, JR.,
859½ Hunter Street N.W.,
Atlanta, Georgia, 30314,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York, 10017,

Attorneys for Appellants.

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BRIEF FOR THE APPELLANTS

Opinions Below

The opinions below (R. 132, 154) are reported at 251 F. Supp. 333 (N. D. Ga. 1966).

Jurisdiction

The judgment below (R. 178) was entered on February 16, 1966. Appellant filed a notice of appeal in the court below on the same day (R. 180).

The District Court had jurisdiction under 28 U. S. C. §§ 1331, 1343, subds. 3 and 4, 2201 and 2281, and under 42 U. S. C. §§ 1971, 1983 and 1988. The appellees moved to dismiss the appeal or to affirm the judgment below. On June 20, 1966, the Court noted probable jurisdiction (R. 186).

Questions Presented

1. Did the Georgia House of Representatives exceed its authority under the Georgia Constitution in excluding Mr. Bond from his elected office as representative to the House solely because of the opinions he expressed on issues of national concern.

2. Are the provisions of the Georgia Constitution, as interpreted by the court below, unconstitutionally vague under the Fourteenth Amendment.

3. Did the exclusion of Mr. Bond from legislative office solely because of the opinions he expressed impair freedom of opinion and speech as well as his privileges and immunities under the First and Fourteenth Amendments.

4. Did his exclusion from office disenfranchise Mr. Bond's constituents in violation of the due process and equal protection clauses of the Fourteenth Amendment.

5. Does House Resolution 19 disqualifying Mr. Bond from his elected office constitute an *ex post facto* law or a bill of attainder in violation of Article I, Section 10 of the United States Constitution.

Constitution and Legislative Acts Involved

The provisions of the Georgia Constitution involved in this case are as follows:

> Article III, Section VII, Paragraph I (§ 2-1901, Ga. Code Ann.), making the House "the judge of the election, returns, and qualifications of its members", *infra*, p. 47.
>
> Article III, Section VI, Paragraph I (§ 2-1801, Ga. Code Ann.), setting forth the members' qualifications, *infra*, p. 47.

Article III, Section IV, Paragraph V (§ 2-1605, Ga. Code Ann.), specifying the oath of office of representatives, *infra*, p. 47.

The following provisions of the Georgia Constitution setting forth the disqualifications for office are also involved in this case:

Article II, Section II, Paragraph I (§ 2-801, Ga. Code Ann.), *infra*, p. 48.

Article III, Section IV, Paragraph VI (§ 2-1606, Ga. Code Ann.), *infra*, p. 48.

Article VII, Section III, Paragraph VI (§ 2-5606, Ga. Code Ann.), *infra*, p. 49.

The legislative actions involved in this case are as follows:

House Rule 61 of the Georgia House of Representatives adopting the provisions of Article III, Section VII of the Georgia Constitution, *infra*, p. 49.

House Resolution 19 of January 10, 1966, excluding Mr. Bond from office, *infra*, pp. 49, 50.

Statement of the Case

This case arises from the refusal of the Georgia House of Representatives to seat the appellant Julian Bond, the duly elected Representative from the 136th House District, Atlanta, Fulton County, Georgia. The events which led to his exclusion from the Georgia House are as follows:

A. How Mr. Bond Acquired the Right to be Sworn and Seated as a Member of the Georgia House of Representatives

The United States District Court for the Northern District of Georgia in *Toombs* v. *Fortson*, 241 F. Supp. 65

(N.D. Ga. 1965), ordered the Georgia House of Representatives reapportioned on the basis of population. As a result, Fulton County, Georgia, gained 21 seats in addition to the three seats it already held, making a total of 24 Representatives from that county, one for each of the 21 newly created House Districts and three Representatives at large. Pursuant to legislation enacted in compliance with the order in *Toombs* v. *Fortson, supra*, House District 136 was created and a primary election was held on May 5, 1965 to nominate a candidate for this office (R. 4, 105). Appellant Bond, a 25-year-old Negro pacifist and communications director of the Student Nonviolent Coordinating Committee (hereinafter SNCC) entered and won the Democratic nomination. He received 1,243 votes, and the Rev. Howard Creecy Sr., his opponent, a Negro also, 522 votes (R. 4, 105, 106).

In the general election held on June 15, 1965, appellant Bond defeated his Republican opponent, Malcom J. Dean, Dean of Men at Atlanta University and a Negro, by a vote of 2,320 to 487 (R. 4, 106). Eighty-two per cent of the eligible voters voted, more than in any other House District (R. 106). House District 136 is predominantly Negro. Of the 6,500 voters, 6,000 are Negroes (R. 4, 106).

Appellant Mrs. Arel Keyes voted for Julian Bond in both the primary and in the general election. Appellant Dr. Martin Luther King, Jr., Nobel Peace Prize laureate and noted civil rights leader, is a resident of House District 136 (R. 4, 120).

B. Events of January 6, 1966 Giving Rise to the Demand to Exclude Mr. Bond

On January 6, 1966 SNCC issued a statement to the press critical of American policy with respect to Viet Nam and with respect to equal rights for Negroes within the United States (R. 135, 136). The statement placed

responsibility for the murder of Samuel Young [1] in Tuskegee, Alabama, upon the federal government and equated the failure of the Administration to protect Samuel Young with the death of Vietnamese peasants emanating from an aggressive foreign policy conducted in violation of international law (R. 136, 137). SNCC charged the United States with deception in its concern for freedom for the Vietnamese people and for the freedom of colored people in the Dominican Republic, Africa, and in the United States (R. 136, 137).

Scoring the unpunished acts of violence and false imprisonment to which its members and others engaged in the struggle for equal rights in the South had been subjected, the SNCC statement questioned both the ability and the desire of the federal government to guarantee free elections abroad and labeled declarations to "preserve freedom in the world", a hypocritical mask behind which the United States suppresses liberation movements (R. 137).

The statement expressed SNCC's support for men in this country unwilling to respond to a military draft. SNCC questioned, "where is the draft for the freedom fight in the United States?" (R. 137). The statement, after noting the disproportionate number of Negroes serving in Viet Nam, concluded:

> "We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alterna-

[1] Samuel Young, a SNCC worker, was a Navy veteran. He lost one of his kidneys from a wound he had received in the ill-fated Bay of Pigs invasion of 1961 off the coast of Cuba. Young was shot and killed in January, 1966 near a gasoline service station in Macon County, Alabama as he approached the station to use the rest-room. New York Times, Jan. 5, 1966, p. 1, col. 2.

tive, knowing full well that it may cost their lives—as painfully as in Viet Nam." (R. 137).

Later in the afternoon, a newsman employed by a state-owned radio station called Julian Bond, who had not participated in drafting the statement, at his residence in Atlanta and inquired whether Bond endorsed the SNCC statement (R. 36, 45, 48). Bond said that he did, adding that as a pacifist he opposed all wars and was "eager and anxious to encourage people not to participate in it [war] for any reason that they choose" (R. 111). He further stated that he agreed with the statement for the reasons set forth because he thought it was "sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States" (R. 111). He saw no conflict between his endorsement of the SNCC statement and the performance of his duties as a legislator or his ability to take the oath of office (R. 111).

C. Proceedings in the House of Representatives to Exclude Mr. Bond

On the morning of January 10, 1966, when Mr. Bond arrived at the House of Representatives to be sworn in as the Representative-elect from the 136th House District, the Clerk of the House ordered him to stand aside as the oath was administered to the other Representatives. Challenges to Mr. Bond's right to be sworn and seated, based upon his statement to the press, were filed by at least 75 white members of the House. The petitions charged, *inter alia*, that Mr. Bond's actions and statement gave aid and comfort to the enemies of the United States, violated the Selective Service laws, and tended to bring discredit and disrespect on the House of Representatives (R. 13-15); that he had stated that he "admires the courage of those persons who burn their draft cards" (R. 13). It was also charged that the statements and views of Mr. Bond disqualified him

from taking the oath to support the Constitution of the United States and the Constitution of Georgia required of a member of the House of Representatives (R. 14, 18, 19). The petition charged that Mr. Bond's "full endorsement" of the SNCC policy statement "is totally and completely repugnant to and inconsistent with the mandatory oath prescribed" for members (R. 19).

Mr. Bond filed a written response to the challenge petitions, denying that he was disloyal, disqualified, or that he had committed treason, or violated any law. His response alleged, *inter alia*, that the challenges, contests and petitions were filed against him to deprive him of his rights under the First Amendment (R. 21).

A Special Committee composed of the Rules Committtee and three additional members, two of whom were Negroes, was appointed to hear the challenge. Three of the persons challenging Mr. Bond's right to be seated served on the Special Committee (R. 9).

A hearing was then held on the challenge petitions for the purpose of deciding "the substance of what Mr. Bond said" before offering himself for membership in the House, "and the intentions behind what he said" (R. 29). For evidence, the challengers introduced a tape of the telephonic interview on January 6, 1966, a tape of an interview with Mr. Bond in the hallway of the State Capitol immediately after the Clerk refused to administer the oath to him (R. 115), and the testimony of Mr. Bond (R. 81). Mr. Bond was asked at the hearing whether he admired "the courage of persons who burn their draft cards" (R. 40). He replied:

> "I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked the question." (R. 41).

Mr. Bond called four witnesses who urged his seating and stated that he deserved the right to be seated (R. 58, 61, 65, 69).

The Special Committee then recommended that Mr. Bond not be seated (R. 88). The two Negro members dissented along with a white legislator from Fulton County (R. 89, 92). The House then adopted House Resolution 19 not to seat Mr. Bond in accordance with the majority recommendation of the Special Committee (R. 99).

D. Proceedings in the Court Below to Remedy the Exclusion

Mr. Bond and his constituents thereupon instituted this action for injunctive relief and a declaratory judgment that the legislature's action was unauthorized by the state Constitution and violated their rights under the federal Constitution. A three-judge court was convened under 28 U. S. C. § 2281, and conducted a trial of the issues.[2]

On February 14, 1966, the Court rendered final judgment against the appellants. It unanimously held that it had jurisdiction because the plaintiffs had asserted substantial First Amendment rights (R. 140). The Court, Chief Judge Tuttle dissenting, struck from the complaint the names of the appellants other than Mr. Bond on the ground that they lacked "such a direct interest in the litigation as would give them standing to bring the complaint" (R. 141).

On the merits, the Court was also divided. The majority agreed that "[t]he substantial issue in the case rests on the guaranty of freedom of speech or to dissent, under the First Amendment as the amendment has long been applicable to the states under the due process clause of the Fourteenth Amendment" (R. 142). Nevertheless, it held that Mr. Bond's "statements and affirmation of the SNCC state-

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[2] At the trial, in order to avoid adding the State Treasurer as a party defendant, the parties stipulated that the State of Georgia would pay Mr. Bond's legislative salary should he prevail upon this appeal (R. 185).

ment as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (R. 153).

Chief Judge Tuttle, dissenting, was of the view that since substantial federal constitutional issues of freedom of speech were involved, the Court was under a duty to construe the Georgia constitutional provisions "with an eye to the avoiding of the constitutional question if possible" (R. 166). He concluded that Mr. Bond had met the qualifications for legislative office explicitly set forth in the Constitution and that it could not be construed to authorize rejection from elected office for a reason not specified, *viz.*, for making a lawful public statement upon foreign affairs.

E. Subsequent Actions by the Electorate

While this appeal was pending the Governor of Georgia called a special election to fill the vacancy created by Mr. Bond's exclusion. Mr. Bond entered the election on protest and won it on February 23, 1966. He was again prevented from taking his seat by a decision of the Rules Committee authorized by the House to act during the legislative recess. The decision was made after a hearing in which he declined to recede from the earlier position which had led to this litigation.[3] On September 14, 1966, Mr. Bond again won the Democratic primary and will be the Democratic candidate in the November 1966 election.

Summary of Argument

I

In excluding Mr. Bond from the office to which he had been elected, the Georgia House exceeded its authority

[3] See appellees' motion to affirm or dismiss, appellants' brief in opposition and motion to advance, and appellants' memorandum of June 14, 1966.

under the clear language of the Georgia Constitution. This conclusion is further supported by the lessons of Anglo-American history, by Georgia case law, and by the need to avoid the substantial constitutional problems otherwise presented by this case.

The Georgia Constitution is explicit on the subject of the qualifications and disabilities for office in the House. Article III, Section VI, Paragraph I sets forth the qualifications, *infra*, p. 47. Three succeeding articles set forth in precise terms the reasons for disqualifications or ineligibility, *infra*, pp. 48, 49. The court below agreed that Mr. Bond met these constitutional requirements. The case does not present the different and broader power of the House to punish its members "for disorderly behavior or misconduct," *infra*, p. 49.

The constitutional provision that the House "be the judge of the election returns, and qualifications of its members" authorizes it to determine whether the constitutional qualifications have been met, not to add new ones. This view is epitomized by the Middlesex election case of John Wilkes, *infra*, p. 19 which was reflected in the language of the federal Constitution and in many of the succeeding state constitutions prescribing qualifications for legislative office.

The oath required of a legislator that he will support the federal and state Constitutions, and will "so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State", *infra*, p. 47 does not authorize the House to impose additional qualifications. Such a construction of the oath is a distortion of language raising serious constitutional problems of vagueness, impairment of freedom of speech, denial of the franchise, and gives rise as here to a bill of attainder and an *ex post facto* law. It also violates the salutary rule that courts should, if possible, seek a construction which would avoid constitutional problems.

II

There is nothing vague about the provisions of the Georgia Constitution which explicitly set forth both the qualifications and disqualifications of members of the legislature. However, the finding below in the constitutional requirement of an oath of office, Article III, Section IV, Paragraph V, of an implicit substantive qualification for office makes the oath unconstitutionally vague. In terms, the oath is a promise that its taker will support the federal and state Constitutions and conduct himself in his judgment in the state's best interests. The court below has changed this promissory oath into a representation as to the past, giving a legislative majority the authority to determine whether the oath can be sincerely taken. The required assessment of the legislator's past behavior, statements and opinions finds no standard in an oath as to what is "most conducive to the interests and prosperity of this State . . ." in his judgment. Such an oath is unconstitutionally vague under this Court's decisions in *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 and *Baggett* v. *Bullitt,* 377 U. S. 360. The vice of vagueness is aggravated since the oath as applied admittedly touches upon sensitive First Amendment freedoms.

III

It is not disputed that Mr. Bond was excluded from office solely because of his opinions and statements on national issues. This exclusion strikes at the "national commitment" for debate on public issues embodied in the First Amendment. It does violence to the guarantee in the privileges and immunities clause of the right to assemble, debate and petition on issues affecting the federal government. An elected legislator has as much right as his constituents under the First Amendment to have these beliefs and to state his opinion on the subject. Indeed, he has a special duty to state his views to his constituents who

are entiled to have a basis for evaluating him. He also carries out his responsibilities by expressing their views.

Neither the principle of separation of powers nor that of federalism justifies a diminution of First Amendment protections. It is a judicial function to restrain illegal action by the other branches of government, and the federal courts have the responsibility of protecting federal constitutional rights against state action. The test applied below of a "rational evidentiary basis" has been held to be appropriate in cases of economic regulation, not where First Amendment freedoms are involved. An elected representative has an absolute right to express his opinions on public issues without being declared ineligible for office.

But even under the lower court's own test, there was no rational basis for believing that Mr. Bond's statements "could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take." The SNCC statement which he endorsed was a vigorous expression of opinion on national affairs and protected by the First Amendment. Mr. Bond's approval of it and his admiration for the courage of persons who were prepared to act in accordance with their conscience was not inconsistent with his oath of office. There was no substantive state interest here comparable to those found in cases involving conspiracies to overthrow the government, obscenity and disorderly conduct in the street. The state has no legitimate interest in the suppression of dissenting views in its legislature; indeed, the policy of Georgia, constitutionally established, is not to disqualify legislators even for criminal conduct until after a judgment of criminal conviction. The very subject under discussion, national conscription for military service, is beyond state jurisdiction. *Pennsylvania* v. *Nelson*, 350 U. S. 497. But there is a real state interest inherent in a democracy in the expression of dissenting views by the members of the Legislature, and in obedience to the choice of the electorate.

IV

Mr. Bond's constituents have been deprived of representation in the House. Mrs. Keyes' right to cast a meaningful vote and Dr. King's right to be represented are as important as Mr. Bond's right to take office. To deprive them of these rights because the legislature disapproved of Mr. Bond's political views is to violate the due process and the equal protection clauses of the Fourteenth Amendment. The court below was therefore in error in holding that they lacked a direct interest in the litigation.

V

House Resolution 19 is a bill of attainder under the tests established by history and by this Court and violates Article I, Section 10 of the United States Constitution. It named Mr. Bond as the object of the resolution and it punished him for his expressions of political opinion. The House Resolution is also an *ex post facto* law, violative of the same constitutional provisions. The Georgia Constitution afforded no notice that a legislator's opinions and public statements would disqualify him from office. It is an *ex post facto* law because it is punishment for acts innocent at the time of occurrence.

ARGUMENT

POINT I

The House did not have power under Georgia law to bar Mr. Bond from office.

Chief Judge Tuttle, dissenting below, correctly stated that "the House exceeded its authority [under the Constitution and laws of Georgia] in voting to reject Bond" (R. 154, 176). This conclusion was required by the clear

language of the Georgia Constitution, the absence of conflicting state court decisions, and the need to avoid the substantial constitutional problems otherwise presented by this case.

The Georgia Constitution is explicit on the subject of the qualifications of and the disabilities for office in the House of Representatives.

Article III, Section VI, Paragraph I provides:

> "Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected." (§ 2-1801, Ga. Code Ann.)

The disqualifications appear in three other provisions of the same Constitution.

Article II, Section II, Paragraph I, entitled "Registration of electors; who disfranchised", provides that:

> "* * * the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larcency, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons." (§ 2-801, Ga. Code Ann.)

Article III, Section IV, Paragraph VI, entitled "Eligibility; appointments forbidden", denies a seat in either House to persons "holding a military commission, or other appointment, or office having an emolument, or compensation annexed thereto, under this State, or the United States" (with certain exceptions) and to "any defaulter for public money, or for any legal taxes". (§ 2-1606, Ga. Code Ann.)

Article VII, Section III, Paragraph VI, entitled "Profit on public money", makes it "a felony, and punishable as may be prescribed by law, a part of which punishment shall be disqualifications from holding office" for a member of the General Assembly to receive "any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes." (§ 2-5606, Ga. Code Ann.)

The precision of these qualifications stands out in contrast to the broader power of the House to punish its members "for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion" Article III Section VII Paragraph I (§ 2-1901, Ga. Code Ann.). The breadth of this latter power is appropriately balanced in the Georgia Constitution as in most others by the requirement that "no member shall be expelled except by a vote of two-thirds of the House to which he belongs", *ibid.*

The majority below did not disagree with the Chief Judge's view that Mr. Bond could not be excluded under any specific provision of the Georgia Constitution. Instead, it denied that the "qualifications and disqualifications of legislators in the Georgia Constitution are all-inclusive" (R. 148), and it found in the principle of separation of powers an *implied* right in the Georgia House to reject the majority choice of the voters. It said that the Chief Judge's "restrictive" view was "unfounded in recognized authority and not in keeping with our history or the principle of separation of powers" (R. 144).

It is not clear from the decision below which of the authorities and facts it sets forth was intended to be covered by the terms "authority", "history" and "separation of powers". Regardless of how they are categorized, they do not support the conclusion of the court below.

Every Georgia Constitution, including the first Constitution of 1777, has specified the qualifications of representa-

tives.[4] The frequent changes which have been made in these qualifications suggest that close attention has been paid to the problem, and that the drafters of the Constitutions have always sought to make the qualifications explicit and to keep them politically meaningful. There is no indication in the journals or reports of the conventions[5] or in the scholarly discussions of Georgia constitutional law[6] that qualifications for legislative office existed outside those specified in the Constitution.

No state court in Georgia has ever held that the House has the power to impose qualifications. The Supreme Court of Georgia held directly to the contrary in 1869 when the results of an election for Clerk of the Superior Court were challenged on the ground that the victor had "one-eighth or more of African blood" and hence was ineligible under the Georgia code. In *White* v. *Clements*, 39 Ga. 232, 265, the court definitively held that "if the Constitution prescribes a qualification for an officer, it by necessary implications denies to the legislature the power to fix new and other qualifications."

The court below cited three Georgia state cases for the proposition that its courts "have consistently refused to take jurisdiction over controversies having to do with qualifications of legislators. The Senate or House, as happened to be the case, was deemed to have exclusive juris-

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[4] The constitutions are cited at R. 143.

[5] See, *e.g.*, Journal of the Georgia Constitutional Convention, January 4, 1789, May 4, 1789; *Journal of the Georgia Constitutional Convention of 1798*, ed. Saye, 36 The Georgia Historical Quarterly, No. 4, Dec. 1952, 350, 356, 365; A Stenographic Report of the Proceedings of the Georgia Constitutional Convention, 1877, 374.

[6] See McElreath, *A Treatise on the Constitution of Georgia* (1912); Saye, *A Constitutional History of Georgia* (1948); Ware, *A Constitutional History of Georgia* (1947).

diction under the Georgia Constitution. *Rainey* v. *Taylor*, 1928, 166 Ga. 476, 143 S. E. 383; *Fowler* v. *Bostick*, 1959, 99 Ga. App. 428, 108 S. E. 2d 720; and *Beatty* v. *Myrick*, 1963, 218 Ga. 629, 129 S. E. 2d 764" (R. 143-144). None of those cases, as Chief Judge Tuttle pointed out, gives the House or Senate jurisdiction "to judge whether the contesting parties lacked qualifications *which are not expressly stated as 'qualifications' or rules of 'eligibility' in the Georgia Constitution*" (R. 167). In *Rainey*, the General Assembly was held solely authorized to determine whether the successful candidate was disqualified under a constitutional prohibition against one holding another state office. In *Fowler*, the same issue was raised with respect to the position of court clerk. *Beatty* involved not qualifications but the judging of the election results.

Those cases were correctly decided under the constitutional provision that "each House shall be the judge of the election, returns and qualifications of its members . . .", Article III, Section VII, Paragraph I (§ 2-1901, Ga. Code Ann.). That provision does not authorize the House to establish qualifications other than those set forth in the Constitution, nor did the court below so hold. It means that the House is to determine whether the members meet the qualifications specified by law.

The lower court's statement that "there is at least one disqualification in the Georgia law which is not contained in the Constitution" (R. 147) is not apposite. It is not clear that the statute making "persons of unsound mind" ineligible for "civil office" refers to the legislature (Ga. Code Ann. §§ 89-101 subd. 5), *cf.* 17 Op. Atty. Gen. (U. S.) 420 (1882) interpreting Art. 2, Section 4 of the United States Constitution; if so, it would violate the Georgia Constitution, *White* v. *Clements*, *supra*. In any event, the establishment of qualifications by statute is very different from a House Resolution adopted pursuant to quasi-judicial powers.

Chief Judge Tuttle's conclusion that the qualifications must be specified by law, not promulgated on an *ad hoc* basis, is supported by the 18th century parliamentary history of England and by the debates and actions of the Federal Constitutional Convention of 1787. The former is important because of the close relationship between John Wilkes and the Revolutionists, the latter because the United States Constitution was followed by the Georgia Constitution which like it made the qualifications for legislative office quite specific.

Significant English history on this point goes back to *Ashby* v. *White* (1702), 2 Ld. Raym. 938, 14 S. T. 695, where Chief Justice Holt, dissenting, expressed the view that "since the privileges of Parliament were a part of the law, they must be defined by the law, and not by the resolutions of the House". 10 Holdsworth, *History of English Law*, 543.[7] As Mr. Justice Frankfurther has said, "The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 id. 320", *Tenney* v. *Brandhove*, 341 U. S. 367, 376-377.[8]

The principle was established most dramatically by the Middlesex election case of John Wilkes[9] who is known in Anglo-American constitutional history for more than his successful assault upon general warrants employed to ferret out opposition to the Crown,[10] or legislative im-

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[7] Holt's opinion was adopted by the House of Lords. See, H. L. Jour. XVII, 534 (1704); Williams, *The Eighteenth Century Constitution* (1960) 221, 224-228.

[8] *Ashby* is also cited in *Gray* v. *Sanders*, 372 U. S. 368, 375, n. 7.

[9] The Middlesex election case is described at length in May, *Constitutional History of England*, I, 364-384; Chafee, *Free Speech in the United States* (1964) 242-247; 10 Holdsworth, *History of English Law*, 540-549; Williams, *The Eighteenth Century Constitution* (1960), 222-223, which includes significant parliamentary resolutions on the subject, *id.* at 242-244.

[10] Chafee, *op. cit.* 242.

munity from arrest [11] or his insistence upon the reporting of parliamentary debates.[12]

Wilkes was elected to the House of Commons as a member for the County of Middlesex in 1768 and was expelled from it on account of "seditious libel", *viz.*, his attack upon George III. He was re-elected, re-expelled and declared incapable of being elected to serve in that Parliament. On his third re-election the House declared his opponent to have been elected. "The crux of the matter was whether the House had power to incapacitate Wilkes from being elected." [13] This issue was bitterly contested in England, with financial and other support from the American colonists, whose cause was identified with that of Wilkes.[14] It was recognized in both countries that the right of the people to choose their representatives was at stake. Thus, in the House of Commons serjeant Glyn stated:[15]

> "The disqualification of Mr. Wilkes not being the law of the land, the freeholders of Middlesex were not obliged to take notice of it. That the disqualifications of bodies of men, as clergy, aliens, etc., were all either by express laws, or by implication from the common law, and that the votes of the House to that effect were only declaratory, but not enacting. That undoubtedly the House had a jurisdiction over its own members, and were judges of the rights of electors, but such judgments must be according to law, a natural consequence of every

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[11] *Ibid.*

[12] E. N. Williams, *op. cit.* 223.

[13] *Ibid.*

[14] Miller, *Origins of the American Revolution* (1943) 201, 305, 317, 321-325, 425, Rudé, *Wilkes and Liberty*; Beloff, *The Debate on the American Revolution, 1761-1783* (2d ed. 1960) 21, 27; Postgate, *That Devil Wilkes* (1930) 150, 186, 234-235; Schlesinger, *Prelude to Independence* (Vintage ed 1965) 35-37 and *passim.*

[15] Parl. Hist. Vol. XVI, 587 in; Holdsworth, *op. cit.* at 543.

> court of judicature in this kingdom. That the rights of the freeholders of Middlesex, as well as the right of every citizen or burgess, was an inherent right in them, not derived from the House of Commons, and therefore could not be taken away from them by the House, except in cases when, offending against law, they had forfeited a right to such privileges."[16]

In 1782 the House of Commons expunged the prior exclusions "as being subversive of the Rights of the whole Body of Electors of this Kingdom".[17] Since then it has been established law in England that there may be no disqualification for office except for reasons established by law, see Erskine May's *Treatise on the Law, Privileges and Proceedings and Usage of Parliament* (17th ed. 1964) 60-63.

It was quite natural that the draftsmen of the various American Constitutions should take pains to ensure that the legislative bodies be selected by the people in accordance with prescribed conditions of office. Thus, on the floor of the Constitutional Convention of 1787 James Madison successfully led the opposition to a proposal "to give to Congress power to establish qualifications in general . . . and it also defeated the proposal for a property qualification. . . ." Warren, *The Making of the Constitution* (1928), 420-422. As the Journal of the Federal Convention of 1787 states:

> "Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy

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[16] See also Parl. Hist. Vol. XVII, 131-134.

[17] H. C. Jour. XXXVIII, 977 (May 3, 1782); William, op. cit., 244.

> as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction.
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> Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-50.

Authoritative contemporary discussion was to the same effect. Alexander Hamilton wrote:

> "The qualifications of the persons who may choose or be chosen . . . are defined and fixed by the constitution; and are unalterable by the legislature." The Federalist, No. 60 (Cooke ed. 1961) 409.

And Mr. Justice Story wrote:

> "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as requisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." *Story on the Constitution*, § 625 (6th ed. 1891) 461.

Mr. Warren is correct in concluding that, "The elimination of all power in Congress to fix qualifications clearly

left the provisions of the Constitution itself as the sole source of qualifications", Warren, op cit. at 422.[18]

Significantly, a constitutional amendment was apparently deemed necessary to exclude persons from Congress who, contrary to their oath, had "engaged in insurrection or rebellion" or "given aid or comfort to the enemies" of the United States (Const., Amendment XIV, § 3).

It is reasonable to assume that the views of the delegates to the Federal Constitutional Convention were known and accepted in Georgia. John Wilkes was strongly supported in Georgia as elsewhere in the United States.[19] The Georgia Convention of May 1789 adopted the state's second Constitution, some 16 months after Georgia had ratified the federal Constitution, containing language similar to that in the federal Constitution.[20]

The plain language of the Georgia Constitution, reinforced by English and American constitutional history is not refuted by the occasional partisan claims in Congress to a greater power over qualifications. This is very different from the administrative implementation of a statute in which Congress by failing to amend is deemed to acquiesce. *Cf. United States* v. *Midwest Oil Co.*, 236 U. S. 459. For every claim of a legislative body's power to fix qualifications there is an equally firm claim to the contrary

[18] The same conclusion was reached after a detailed study of the convention proceedings. Note, *The Right of Congress to Exclude its Members*, 33 Va. L. Rev. 322 (1947). Another commentator relied upon by the court below concerning Congressional practice (R. 146-47) agrees that "neither House may impose qualifications additional to those that are mentioned" I Willoughby, *The Constitution of the United States* (2d ed. 1929) § 340.

[19] See, *e.g.*, McCall, *History of Georgia* (1816) II, 299-300.

[20] Georgia's first Constitution, that of 1777, contained a statement of qualifications. Its second, that of 1789, was the first to authorize the legislature to judge the "election, returns and qualifications" of members.

and inconsistency of position by the most judicious of Senators is not unknown.[21] It is more significant that on a subject so fraught with politics the attempt to impose extra-constitutional qualifications has been so rarely asserted.

The "historical precedents" cited by the court below are illusory (R. 146). The Senate never decided the case of Senator Bilbo who died before action could be taken. The principal charge against him related to his conduct of his election campaign, a legitimate subject of inquiry (see *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong. 2d Sess., 142-143). As for Senator Smoot, the Senate refused to exclude him "for alleged disqualifications other than those specified in the Constitution", *id.* at 97-98; even the attempt to expel him failed.

The federal cases relied upon by the majority below are equally inapposite (R. 145-148). Two of them, *In re Chapman*, 166 U. S. 661, and *Barry* v. *United States*, 279 U. S. 597, involve the federal power of investigation. *Wilson* v. *North Carolina*, 169 U. S. 586, involved a state governor's suspension of a state commissioner. *Snowden* v. *Hughes*, 321 U. S. 1, did not involve a legislative imposition of new qualifications, but a challenge of election results.[22]

The court below finally sought to find in the "oath of members" provision of the Constitution (Article III, Section IV, Paragraph V) some authority for the action of the House:

> "Each senator and representative, before taking his seat, shall take the following oath, or affirmation,

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[21] See, for example, the views of Senators Taft and George on the qualifications of Senator Langer, 88 Cong. Rec. 2859 (1942) and Senator Bilbo, (93 Cong. Rec. 15, 16).

[22] The single state court case cited by the majority was *Hiss* v. *Bartlett*, 3 Gray 468 (1855), a case involving the broader right of expulsion (R. 145).

> to wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State'." (§ 2-1605, Ga. Code Ann.)

Nothing in this oath authorizes the House to bar from office a person who meets the qualifications of Article III, Section VI, Paragraph I of the Constitution, and who is not disqualified by the explicit provisions for disqualification. The Constitution requires an elected member to take the oath before he takes his seat; it does not authorize his fellow members to prevent him from taking the oath, which is promissory in character and not a standard for judging past conduct. There is nothing more subjective and hence incapable of use as a test of qualifications than the agreement that the oath-taker will support the state and federal Constitutions and that he will conduct himself as will in his judgment "be most conducive to the interests and prosperity of this State."

The determination of loyalty is not to be found in the manipulation of this oath of office. The state Constitution has made explicit provision elsewhere for such a determination which disqualifies persons "convicted in any court of competent jurisdiction of treason against the state," Article II, Section II, Paragraph I, *infra*, p. 48.

The attempt to turn the oath provision, a solemn appeal to the conscience of a member, into a qualification for office is a plain distortion of language and of the purpose of an oath of office. Constitutional questions aside, it should be rejected, simply because words should be given their plain meaning and not used to achieve purposes radically different from those intended by the draftsmen.

Moreover, the construction adopted below does raise a host of constitutional problems: vagueness (*infra*, p. 25),

effect upon the franchise (*infra*, p. 38), effect upon freedom of speech (*infra*, p. 27) and the prohibition against bills of attainder and *ex post facto* laws. These problems are so familiar that, even before studying them closely, the wisdom of Chief Judge Tuttle's admonition is evident: a court should first construe the statute with an eye to the avoiding of the constitutional question if possible (R. 166). See *Kent* v. *Dulles*, 357 U. S. 116; *United States* v. *Rumely*, 345 U. S. 41, 46.

POINT II

The oath provision of the Georgia Constitution, as interpreted below, is unconstitutionally vague under the Fourteenth Amendment.

The Georgia Constitution on its face contains an *explicit* statement of (i) the qualifications of Representatives,[23] (ii) disqualification after conviction of specific crimes and of "idiots and insane persons",[24] (iii) disqualification of persons holding other state offices, receiving other state benefits, or in default of their financial obligations.[25] There is nothing imprecise about any of these provisions.

But the court below as we have seen, *supra*, p. 23, has found that there is an *implicit* qualification for office—namely that a member-elect's past conduct indicates that he will support the state and federal Constitutions and that "on all measures which may come before me, I will so conduct myself, as will in my judgment be most conducive to the interest and prosperity of this State."

The Court below has changed the promissory oath into a representation as to the past. As thus construed, the oath

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[23] Article III, Section VI, Paragraph I, *infra*, p. 47.

[24] Article II, Section II, Paragraph I, *infra*, p. 48.

[25] Article III, Section IV, Paragraph VI, *infra*, p. 48.

provision authorizes a legislative majority to evaluate the oath-taker's opinions, past behavior and public statements to determine whether he is capable of taking the oath with sincerity. There are absolutely no standards for this judgment by the legislature.

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, the Court doubted that the words "aid, support, advice, counsel or influence" to the Communist Party were "susceptible of objective measurement", *supra*, at 285-286; conversely, there is no more precision in evaluating Mr. Bond's "support" of the Constitution. Indeed, a recent Georgia legislature, whose members had taken this very oath, accused this Court of treason for its decisions protecting constitutional rights. Interposition Resolution, (March 9, 1956) H. R. 185, Georgia Laws 1956, No. 130, at 642.

Every legislator may have a different view as to whether the past behavior of a colleague indicates that his future behavior will "support the Constitution of this State and of the United States". Further, a promise to "conduct myself as will in my judgment, be most conducive to the interests and prosperity of this State" is no more precise than the promise to "promote . . . undivided allegiance to the government of the United States" which this Court held invalid in *Baggett* v. *Bullitt*, 377 U. S. 360.

It is apparent that the measuring rod found by the court below in the constitutional oath of office is vague enough when applied to conduct. It becomes absolutely meaningless when it is applied to public expressions of opinion, which are protected by the First Amendment, as the court below recognizes in the case of the ordinary citizen (R. 151). Where an oath "abut[s] upon sensitive areas of basic First Amendment freedoms" the vice of unconstitutional vagueness is aggravated since, as applied here, it would require all candidates for office to eschew clearly lawful activities. *Baggett* v. *Bullitt*, *supra*, at 372.

POINT III

Mr. Bond's exclusion from elected legislative office solely because of his opinions and public statements on national issues violated the guarantee of freedom of speech and his privileges and immunities under the First and Fourteenth Amendments.

Mr. Bond was denied his seat because of his public expression of opinion on domestic and foreign affairs. This is manifest from the charges filed against him (R. 13-20) and from the hearings in the committee and the House (R. 28-99). This action, endorsed by the court below, strikes at the First Amendment's imperative of a government based upon the consent of an informed citizenry. *Cox* v. *Louisiana,* 379 U. S. 536, 552; *Stromberg* v. *California,* 283 U. S. 359; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270; *Garrison* v. *Louisiana,* 379 U. S. 64; *DeJonge* v. *Oregon,* 299 U. S. 353, 365; *Terminiello* v. *Chicago,* 337 U. S. 1, 4; *Whitney* v. *California,* 274 U. S. 357, 375; *United States* v. *C. I. O.,* 335 U. S. 106.

This Court has recognized the importance to the public of securing information and knowledge in a wide variety of cases involving travel (*Kent* v. *Dulles,* 357 U. S. 116; *Aptheker* v. *Secretary of State,* 378 U. S. 500), freedom to receive information through the mail (*Lamont* v. *Postmaster General,* 381 U. S. 301), newspaper commentaries and advertisements (*New York Times Co.* v. *Sullivan, supra*), criminal libel against public officials (*Garrison* v. *Louisiana, supra*), immunity of government officials from libel (*Barr* v. *Matteo,* 360 U. S. 564) and the arts and literature (*Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684).

These cases have emphasized the central meaning of the First Amendment, namely,

> "the profound national commitment to the principle that debate on public issues should be uninhibited,

> robust, and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra,* at 270.

The exclusion from office of Mr. Bond cannot be squared with the principle that "the censorial power is in the people over the Government, and not in the Government over the people," 4 Annals of Congress 934 (1794) quoted by Mr. Justice Brennan in *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 15.

The SNCC statement was a vigorous criticism of American foreign and domestic policy. It was entitled to constitutional protection regardless of whether or not one agrees with it. As Professor Meiklejohn says, "The vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. . . . These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant," Meiklejohn, *Political Freedom,* 26-28 (1948). And in *Kingsley Pictures Corp.* v. *Regents, supra,* at 688-89, Mr. Justice Stewart stated:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

The First Amendment protection given to the SNCC statement is enhanced by the fact that it related to the functioning of the federal government. This is a subject

upon which the citizens' views are protected also by the privileges and immunities clause of the Fourteenth Amendment. Such is the teaching of *Crandall* v. *Nevada*, 6 Wall. (73 U. S.) 36; *The Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36, 79, and *Hague* v. *C.I.O.*, 307 U. S. 496. In *United States* v. *Cruikshank*, 92 U. S. 542, 552, this Court said:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guarantied by, the United States."

This was applied in *Hague* v. *C.I.O.*, *supra*, at 512 where the Court held that

> "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgement by Section 1 of the Fourteenth Amendment . . ."

The opinion below does not challenge the constitutional right of SNCC to make the statement. Rather, it emphasizes the fact that Mr. Bond "was more than a private citizen; he was an officer and employee of SNCC and was about to become a member of the House of Representatives of Georgia" (R. 152). The court below was of the opinion that an elected member of the House was entitled to less constitutional protection than the average citizen. Underlying the opinion is the unarticulated view that Mr. Bond's elected position imposed upon him the obligation to support "national policy" or to be restrained in his criticism of it.

This is a conception of second class citizenship for a legislator, totally without support in logic or in the con-

stitutional history of legislative bodies. It is completely inconsistent with the duty which the office itself imposes upon the incumbent to engage in a continuing dialogue on public affairs with his constituents. This court has repeatedly recognized the critical importance of exposing the views and conduct of government officials to the view of their constituents and the public at large, *New York Times Co.* v. *Sullivan, supra; Garrison* v. *Louisiana, supra.*

The argument of the court below was rejected by this Court in *Wood* v. *Georgia,* 370 U. S. 375, where a sheriff was held in contempt for issuing a press release criticizing a judge's charge to a grand jury. The State had argued that "because the petitioner is sheriff of Bibb County and therefore owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." (*Id.* at 393.) The Court's response was:

> "The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. Cf. *In re Sawyer,* 360 U. S. 622. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 394-95.

The court below also assumed that freedom of speech is solely for the benefit of the speaker. The contrary is of course true; indeed, the larger interest is that of the public, *Lamont* v. *Postmaster General of the United States, supra*; *Martin* v. *City of Struthers,* 319 U. S. 141, 143. There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant", *Garrison* v. *Louisiana, supra.* If aspirants for public office are to be discreetly silent, how can the people intelligently "discuss the character and qualifications of candidates for their suffrage", *Coleman*

v. *MacLennan*, 78 Kan. 711, 724 (1908), quoted in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 281.

The lower court's novel distinction between the rights of a citizen and those of a legislator led it to disregard the established principles applicable to the First Amendment. Thus, it began by stating that First Amendment rights could be impaired constitutionally "in the context of two fundamental principles of government: separation of powers and state government under our system of federalism" (R. 142). But there is no logical connection between "federalism" and the need to restrict speech. The First Amendment protects speech whatever the source of limitation: federal legislation, *Lamont* v. *Postmaster General, supra*, a state legislative body, *Sweezy* v. *New Hampshire*, 354 U. S. 234, a state judge, *Garrison* v. *Louisiana, supra* or a state criminal prosecution, *Dombrowski* v. *Pfister*, 380 U. S. 479.

Nor is there, any logical connection between the separation of powers doctrine and the need to restrict freedom of speech. That doctrine is not violated when the judicial branch protects First Amendment rights against impairment by either of the other two branches of state government. See, *e.g.*, *Sweezy* v. *New Hampshire, supra.*

The Court below further deviated from the now established method of testing the impairment of First Amendment rights when it applied what it called a "rational evidentiary basis test" (R. 151). For it treated this case as if it involved, not the freedoms of speech and franchise, but the regulation of business or property calling for deference to the legislative judgment (R. 150). But this is a case involving both freedom of speech and of franchise (*infra*, p. 38). It directly affects the "vitality of civil and political institutions in our society", *Terminiello* v. *Chicago*, 337 U. S. 1, 4, and the rights of the appellants and the public are not subject to so narrow a test.

When the rational evidentiary basis test was applied in 1938 to a purely economic issue, Mr. Justice Stone intimated in a famous footnote the distinction between economic regulation and the restriction of First Amendment rights, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. This was fully articulated by Mr. Justice Jackson's opinion five years later in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and *those cases in which it is applied for its own sake.* The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Emphasis supplied.)

During the quarter of a century that has elapsed since the *Carolene Products Co.* case it is fair to say that no case has been decided against a person asserting First Amendment rights upon the basis of the so-called rational evidentiary test. The test may have varied from clear and present danger, *Schenk* v. *United States*, 249 U. S. 47; *Wood* v. *Georgia*, 370 U. S. 375, 384, to "grave and imme-

diate danger", *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, to Chief Judge Learned Hand's variant, *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, *Dennis* v. *United States*, 341 U. S. 494, 507. But the one test never adopted by this Court is that articulated below. There is absolutely no basis for the lower court's reliance upon decisions in two recent criminal cases in support of its rational evidence theory; those cases involved a very different proposition, that a criminal conviction will not stand under the Fourteenth Amendment if the record is devoid of evidence to sustain it. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157 (R. 151). This is a far cry from a holding that a First Amendment right may be impaired or restricted if there is an iota of evidence to justify it.

It cannot be said that this case presents "some compelling state interest [which] justifies the substantive infringement of appellant's First Amendment rights", *Sherbert* v. *Verner*, 374 U. S. 398, 406. It must be remembered that "in this highly sensitive constitutional area, '[o]nly the gravest abuses endangering paramount interests, give occasion for permissible limitation' ". *Ibid*, citing *Thomas* v. *Collins*, 323 U. S. 516, 530. There is no substantial state interest involved here comparable to that found by the Court to exist in cases involving, *e.g.*, the power to investigate subversive activities (*Uphaus* v. *Wyman*, 360 U. S. 72), the power to regulate obscenity (*Mishkin* v. *New York*, 383 U. S. 502), and the power to regulate admission to the bar (*Konigsberg* v. *State Bar of California*, 366 U. S. 36).

The mild observations made by Mr. Bond or endorsed by him were far from "fighting words", and even fighting words were held insufficient to support an infringement of First Amendment rights in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, and see *Garrison* v. *Louisiana*, *supra*. Mr. Bond's statement was made at a press interview. There was no threat of violence in the streets as

in *Feiner* v. *New York*, 340 U. S. 315, cf. *Edwards* v. *South Carolina*, 372 U. S. 229. This Court reversed a conviction in *Herndon* v. *Lowry*, 301 U. S. 242, because there was no situation of imminent danger. Certainly there was no imminent danger here, nor was there even a remote threat of a "putsch", cf. *Dennis* v. *United States*, 341 U. S. 494; Gellhorn, *American Rights* (1960) 76. Here there was a peaceful statement made to a newspaper man in response to his question.

The court below did not properly apply its own test when it concluded that Mr. Bond's statements "could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (R. 153). There is nothing in this record to suggest that Mr. Bond would not support the state and federal Constitutions and would not conduct himself as would in his judgment "be most conducive to the interests and prosperity of this State." There is nothing in the record which would cast doubt upon his integrity; on the contrary, his statements are impressive in their candor and they reflect an admirable concern for the public welfare.

The SNCC statement was a vigorous expression by a Negro organization of its views concerning inadequate protection of the civil rights and lives of the Negroes in this country, and strong opposition to the present war in Viet Nam. It is fair to say that a large section of the intellectual community is openly critical of the Administration's conduct of the war.[26] Such opposition is not unusual in a democracy. Its tradition is reflected in the parliamentary opposition to the English war against the colonies and in American congressional opposition to the Mexican and

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[26] See *e.g.* Commager, *Can we Control the War in Viet-Nam*, Saturday Review, Sept. 17, 1966, 25.

Civil Wars. See, *e.g.*, Chafee, *Free Speech in the United States* (1964) 267 and *passim.*

The statement of the court below that "the SNCC statement is at war with the national policy of this country" (R. 151) is a very strange statement for a court to make under our system of government. There is no such thing as a "national policy" to which dissenting views must be subordinated. That would be indeed the "unanimity of the graveyard" of which Mr. Justice Jackson spoke in *West Virginia State Board of Education* v. *Barnette, supra,* at 641.

The SNCC statement which encouraged alternative work in the civil rights movement as "a valid alternative to the draft", was an expression of sympathy, not of action or its incitement. It violated no law. The Selective Service Law expressly provides for exemption for conscientious objectors 50 U. S. Code App. § 456(j) which the Court has construed broadly in *United States* v. *Seeger,* 380 U. S. 163.

The regulations of the Selective Service System make provision for alternative service or deferments in the national interest, even for persons who are not conscientious objectors, 32 CFR § 1660 et seq. Such work of the kind recommended by SNCC has been found acceptable by Selective Service Boards as an alternative to military service.

Aside from its animadversions on SNCC for its statement, there was even less justification for the court below to conclude that Mr. Bond's statements were repugnant to his oath of office. He is a Negro and a pacifist who is opposed to all war. He did not draft the SNCC statement, nor did he issue a "call to action" (R. 36). He merely responded to a newspaper man's inquiry as to whether he agreed with the statement (R. 110). Should

he have concealed his agreement with the SNCC statement by refusing to answer the press or by telling an untruth?

The court below also referred to Mr. Bond's statement "that he admired the courage of anyone who burned his draft card" (R. 152). This, too, was a response to the press inquiry. A fair reading of the statement—required in the interest of freedom of expression—supports Mr. Bond's explanation when he appeared before the House committee:

> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of some one who could act on his convictions knowing that he faces pretty stiff consequences" (R. 41).

This is no different from the recognition by courts of the integrity of persons even while sustaining their convictions; see *e.g., Uphaus* v. *Wyman, supra.* It is also an oversimplification to suggest that persons charged either with refusal to serve in the armed forces or with the burning of draft cards have committed a crime or are necessarily without constitutional protection. Recent judicial opinions attest to the fact that important First Amendment and other constitutional questions may be involved. See *e.g.* Judge Medina's opinion in *United States* v. *Mitchell,* 354 F2d 767 (2d Cir. 1966) and the opinion in *United States* v. *Miller,* 249 F. Supp. 59 (S.D.N.Y. 1965) pending on appeal.

The mild remarks made here are in contrast to the activities ascribed to the Socialist Assemblymen in January 1920, when they were expelled from the New York legislature on the serious charges of their participation in a revolutionary organization connected with the Communist

International in Moscow which was allegedly pledged to the violent overthrow of the Government of the United States.[27] Despite the fact that the First Amendment, as we know it today, had not developed through judicial decision, former Justice (later Chief Justice) Hughes filed a brief on behalf of the Association of the Bar of the City of New York opposing the action of the legislature and calling attention to the protection of free speech in England. See Chafee, *op. cit. passim,* and Pusey, *Charles Evans Hughes.* (1951) I, 391-393.

The state has no legitimate interest in maintaining a legislature without diversity of opinion. On the contrary, there is "a compelling state interest" that the electorate be free to choose its representatives in the House whatever their political views or expressions of opinion. This interest was stated by Chief Judge Learned Hand in his *"Risk for Risk"* statement in 1952:

> "I believe that that community is really in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciations, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread . . ." Address before Convocation of the University of the State of New York, October 25, 1952, reprinted in *The Spirit of Liberty, Papers and Addresses of Learned Hand* (Dilliard ed. 1953) 284.

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[27] Cf. the subsequent decisions in *Yates* v. *United States,* 354 U. S. 298; *Noto* v. *United States,* 367 U. S. 290.

POINT IV

Mr. Bond's constituents have been disenfranchised in violation of the Fourteenth Amendment.

The people of the 136th House District have twice elected Mr. Bond to represent them in the Georgia House of Representatives. On both occasions the House refused to admit him because it disapproved of his public statements. This legislative fiat did more than deprive him of his property without due process of law; it deprived the residents and voters of House District 136 of their representation in the House.

This strikes directly at the fundamental principle of democratic government that it is the people who have absolute power to dictate their choice of Representatives. This was one of the "Blessings of Liberty" for which the United States Constitution was established. It pervades the Constitution—the provision for the election of Representatives "by the people of the several states" (Article I, Section 2), the guarantee to every state of a "republican form of government" (Article IV, Section 4), the right to vote under the Fourteenth and Fifteenth Amendments.

The view of the court below that the appellees, Dr. Martin Luther King and Mrs. Arel Keyes, do not have a direct interest in this litigation is inexplicable. Dr. King is a constituent of Mr. Bond. Mrs. Keyes is a registered voter. Both have been deprived of representation by the House Resolution whose legality is in question here.

There can be no more direct right in litigation of this kind than that of persons who suffer from the injury.[28]

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[28] *Barry* v. *United States*, 279 U. S. 597, relied upon by the court below, involved the Congressional power of investigation, not standing to sue, and the temporary delay in seating *during* the investigation.

Mrs. Keyes' right to vote becomes meaningless if her choice is to be overridden by a legislative majority. She, like any person whose right to vote is impaired (*Smith* v. *Allwright*, 321 U. S. 649; *Baker* v. *Carr*, *supra*, 204-208; *Gray* v. *Sanders*, 372 U. S. 368, 375) has standing to sue. Dr. King as a resident of the district has a right to be represented in the legislature even if the period of his residence did not, at the time the litigation was instituted, give him a right to vote. Only thus do we adhere to the principle that "the form of government must be representative," (Mr. Justice Clark concurring in *Baker* v. *Carr*, 369 U. S. 186, 261). See also *Wesberry* v. *Sanders*, 376 U. S. 1, 17; *Reynolds* v. *Sims*, 377 U. S. 533, 560.

The principal importance of the Wilkes case is not that it protected the property right of the elected member but that it involved "the rights of the freeholders of Middlesex" to have their designee represent them, *supra*, pp. 19, 20. Mr. Madison was equally concerned with the right of franchise as a "fundamental article[s] in a Republican Government", *supra*, p. 20.

The emphasis of Charles Evans Hughes, speaking for the Association of the Bar of the City of New York in opposition to the exclusion in 1920 of the five Socialist members of the New York Assembly, was upon the same issue of freedom of franchise.

> "Let every resource of inquiry, of pursuit, of prosecution be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed, not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies." Chafee, *op. cit.* 273.

He urged that "these members shall enjoy all the privileges of their seats in recognition of their own rights and of the rights of their constituencies", Chafee, *op. cit.* 275. And as Professor Chafee has said of the New York Assembly:

> "It appealed to force as the normal method of settling conflicts between ideas. It disenfranchised 60,000 American citizens on the basis of a caricature of Socialism. It repudiated government by representation and substituted government by misrepresentation." Chafee, *op. cit.* 282.

This particular problem has never been presented to this Court. But the Court has repeatedly spoken on the fundamental importance of the right of suffrage. The Chief Justice has said that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U. S. 533, 535 (1964), and

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U. S. 651, and to have their votes counted, *United States* v. *Mosely*, 238 U. S. 383. . . . The right to vote can neither be denied outright, *Guinn* v. *United States*, 238 U. S. 347, *Lane* v. *Wilson*, 307 U. S. 268, destroyed by alteration of ballots, see *United States* v. *Classic*, 313 U. S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U. S. 371, *United States* v. *Saylor*, 322 U. S. 385. As the court stated in *Classic*, 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . .' 313 U. S. at 315. . . . And the right of suffrage can be denied

> by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims, supra* at 554-55.

The exclusion of the elected representative nullifies the votes of his constituents. Where the right to vote is concerned, this Court looks to the substance and not the form. See *United States* v. *Classic,* 313 U. S. 299; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461. "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State legislative bodies." *Reynolds* v. *Sims, supra* at 565. Obviously, the exclusion of his Representative deprives him of the right to "effective participation."

Further, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' *Schneider* v. *State,* 308 U. S. 147, 161, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Carrington* v. *Rash,* 380 U. S. 89, 94. In the instant case, the "fencing out" was done after the ballots were counted and the political views were expressed, but there is no difference in principle which can be based on the stage of the electoral process.

We agree with the court below that there was no direct evidence that the ineligibility of Mr. Bond was predicated upon his race, rather than upon his political opinions (R. 141, 153). It is unnecessary for the appellants to establish such motivation in view of the direct impact of the appellees' action upon the First Amendment, upon the privilege to discuss federal issues and upon freedom of franchise. But it would be completely unrealistic not to recognize the racial background of the current dispute. In 1966 Georgia did not engage in a wholesale expulsion of the Negro

members of its legislature, as in 1868 (see Du Bois, *Black Reconstruction in America* (1935) 501-504).[29] But it does have a long contemporary record of discrimination against the Negro in many fields [30] and the representative excluded in the instant case was a Negro representing a Negro constituency who presumed to express himself openly on matters of domestic and foreign policy.

POINT V

The disqualification of Mr. Bond was a bill of attainder and an *ex post facto* law.

This case is governed by much of what the Chief Justice stated for the Court in *United States* v. *Brown*, 381 U. S. 437. The historical discussion, the analysis of the elements of bills of attainder and the tests to be employed —as described in that opinion—are dispositive of the issues in this case. In *Brown*, it was pointed out that the bill of attainder was a parliamentary act imposing punishment for political crime; that the punishment often included the exclusion of the person involved and his sons from Parliament, and that the act frequently named the parties affected, *United States* v. *Brown, supra*, at 441-2.

A review of the reasons for the inclusion of the proscription against bills of attainder either by the Congress or the States into the Constitution led this Court to conclude that "the bill of attainder clause was intended not as a narrow technical (and, therefore, soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply —trial by legislature." *Id.* at 442.

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[29] See also Thompson, *Reconstruction in Georgia* (LXIV Studies in History, Economics and Public Law, Columbia University, 1915), 211-216.

[30] See the cases cited in the brief *amicus curiae* herein of the Emergency Civil Liberties Committee, p. 7.

The instant case shows more of the classic attributes of the bill of attainder in some respects than any of the previously decided cases in this Court. Like all of them, it was an act of the legislative branch imposing sanctions for political crime; see *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex parte Garland*, 4 Wall. (71 U. S.) 333; *United States* v. *Lovett*, 328 U. S. 303; *United States* v. *Brown*, *supra*. But, unlike three of those cases, the legislative act actually named the individual against whom it was directed; and unlike all of them, it disqualified a member of the legislative body itself—a most familiar sanction of the English bill of attainder.

It will, of course, be argued by the appellees, as was done by the government in all the preceding bill of attainder cases, including *Brown*, that disqualification from office is not punishment, but is intended merely to regulate the qualifications of admission to office. But in *Garland*, the Court said that "disqualification from office may be punishment, as in cases of conviction upon impeachment", 4 Wall. at 320. In words appropriate to appellant Bond, in the light of the appellees' *reaffirmation* of his ineligibility, this Court said in *Lovett*, *supra*, that the "permanent proscription of any member to serve the government is punishment and of a most serious type", 328 U. S. 303, 316.

In *Brown*, the Solicitor General presented the argument in more sophisticated form by urging, to use this Court's words, "that the statute was enacted for preventive rather than retributive reasons—that its aim was not to punish Communists for what they have done in the past but rather to keep them from a position where they will in the future be able to bring about undesirable events." *United States* v. *Brown*, *supra*, at pp. 456-57.

But this approach, which had at least the support of repeated expressions of view by all branches of the government, was anticipated by this Court's observation that the

framers had sought to bar "legislative punishment of any form or severity." *Id.* at 447. In *Brown*, the Court described as "archaic" the attempt to limit the definition of punishment to retribution, stating:

> "One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment." *Id.* at 458.

And in a look at history, the Chief Justice added:—

> "A number of English bills of attainder were enacted for preventive purpose—that is, the legislature made a judgment, undoubtedly based upon past acts and associations (as § 504 is) that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations on that person or group in order to keep them from bringing about the feared event." *Id.* at 458-59.

The legislative act against Mr. Bond falls squarely within the scope of the bill of attainder clause. The very charges against him were that he "adheres to the enemies of the United States and of the State of Georgia" (R. 14) that he "gives aid and comfort" to those enemies and that his actions and statements violate 50 U. S. C. App. §§ 462(a) and (b) (R. 14). The intemperate remarks made by his judges in the course of the Committee and House hearings well illustrate Mr. Cooley's warning that the legislative body "is not properly constituted to try with coolness, caution and impartiality a criminal charge especially in those cases in which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode." 1 Cooley, *Constitutional Limitations*, 536-537 (8th ed. 1927), quoted by this Court in *United States* v. *Brown*, *supra*, at 445. Indeed, this emotional approach was manifested by the use in the court below of such an expression as "at war with the national policy of this country" (R. 151).

A legislative punishment for expressions of political opinion is not any the less a bill of attainder because it is phrased in terms of inability to take an oath to support the federal and state constitutions. We note elsewhere that nothing in Georgia law authorizes its legislature to determine whether a person can conscientiously take the oath, *supra,* p. 24, and that the oath provision, if thus construed, has the constitutional defect of vagueness, *supra,* p. 25. But this aside, this Court has repeatedly noted that the form of the legislative act is irrelevant to its classification as a bill of attainder, *United States* v. *Brown, supra,* at 448; *United States* v. *Lovett, supra,* at 315, 316.

Like many other bills of attainder, House Resolution 19 is also an *ex post facto* law in violation of Article I, Section 10 of the Constitution. There is nothing in the language of the Georgia Constitution, statutes or the judicial decisions, which could support the right of the legislature to evaluate the public statements of an electee and to decide that he cannot conscientiously take the oath.

This, then, is an entirely new qualification, written for the day and the man. It was not one generally applicable at the time of Mr. Bond's election; he had no reason to believe that his public statements could be the basis for disqualification. As to him—and those who elected him—House Resolution 19 is an *ex post facto* law. *Calder* v. *Bull,* 3 Dall. (3 U. S.) 386, 390; *De Veau* v. *Braisted,* 363 U. S. 144, 160.

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

HOWARD MOORE, JR.,
859½ Hunter Street, N. W.,
Atlanta, Georgia 30314.

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York 10017.

Attorneys for Appellants.

September 24, 1966.

APPENDIX

Constitutional Provisions and Legislative Acts Involved

Article III, Section VII, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Election, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs." (2-1901, Ga. Code Ann.)

Article III, Section VI, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected. (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph V, of the Georgia Constitution provides in pertinent part as follows:

> "Oath of members.—Each senator and representative, before taking his seat, shall take the following oath, or affirmation, to wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.'" (2-1605, Ga. Code Ann.)

Article II, Section II, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "'Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons." (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

> "Eligibility; appointments forbidden.—No person holding a military commission, or other appointment, or office, having an emolument, or compensation annexed thereto, under this State, or the United States or either of them except Justices of the Peace and officers of the militia, nor any defaulter for public money, or for any legal taxes required of him shall have a seat in either house; nor shall any Senator, or Representative, after his qualification as such, be elected by the General Assembly, or appointed by the Governor, either with or without the advice and consent of the Senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected, unless he shall first resign his seat, provided, however, that during the term for which he was elected no Senator or Representative shall be appointed to

any civil office which has been created during such term." (2-1601, Ga. Code Ann.)

Article VII, Section III, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

"Profit on public money.—The receiving, directly or indirectly, by any officer of State or county, or member or officer of the General Assembly of any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office." (2-5606, Ga. Code Ann.)

House Rule 61 of the Georgia House of Representatives provides in pertinent part as follows:

"Each house shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled except by a vote of two-thirds of the House to which he belongs."

House Resolution 19 of January 10 1966 of the Georgia House of Representatives provides in pertinent part as follows:

"Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

"WHEREAS, a special committee created pursuant to H.R. No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian

Bond of the 136th District has conducted a hearing in said matter; and

"WHEREAS, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

"NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

"BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives, and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

"BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a copy of the aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond."